IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 310

JOHN FAKOURI,
Petitioner,

versus

JOSE MACIEL CADAIS, ET AL.,
Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

GEORGE M. WALLACE,
WADE O. MARTIN, JR.,
Counsel for Respondents.

JOHN W. LEWIS,
SETH LEWIS,
Of Counsel.

INDEX

TABLE OF CASES

TABLE OF CASES—Continued

IN THE

Supreme Court of the United States

No. 310

OCTOBER TERM, 1945

JOHN FAKOURI,
Petitioner,

versus

JOSE MACIEL CADAIS, ET AL.,
Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

STATEMENT OF THE CASE

This proceeding originated in the United States District Court for the Western District of Louisiana, and invoked the jurisdiction of that court on the ground of diversity of citizenship, the plaintiffs (respondents in this Court) being citizens and residents of Brazil, and the defendant (petitioner in this Court) being a resident of the State of Louisiana.

The complaint sought the annulment of a nuncupative will by public act and a judgment of the

Probate Court of the 27th Judicial District in and for the Parish of St. Landry, Louisiana probating this will, which purportedly bequeathed all of the property, real and personal, of the decedent, Elias Mansaur, to the defendant, John Fakouri.

The plaintiffs, one having been emancipated by judgment of the Court of Orphans, Absentees and Interdicts at Manaus, Brazil, and the others, being minors represented by their widowed mother as their natural tutrix or guardian by virtue of a judgment of the same court, are the nieces and nephews of the decedent and his next of kin.

In this capacity, they attacked the validity of said will on the ground that it was not written in conformity to the laws of Louisiana and on the ground that the testator was mentally incompetent at the time of its execution. They also sought to have said will, the judgment of probate thereof and the judgment putting the defendant into possession of decedent's estate declared null and void, and for judgment recognizing plaintiffs as the sole heirs of decedent and, as such, entitled to the possession of his estate.

The District Court rendered a judgment declaring the will null, setting aside the probate thereof, and recognizing plaintiffs as the heirs at law of the decedent and, as such, entitled to the possession of his estate.

The District Court held the will invalid for two reasons. First, that it was void for failure to state that it was dictated to the notary and by him written down as dictated in the presence of the witnesses, as required by the laws of Louisiana and the Supreme Court decisions of that state interpreting these laws. Second, that the testament was void because it was not signed by the testator, nor did it contain an "express mention" of the "cause that hinders him from signing", as required by the laws of Louisiana.

Having found that the testament was void on its face for lack of compliance with the form required by Louisiana law in the execution of such nuncupative wills by public act, the District Court found it unnecessary to pass upon the question of the testator's mental capacity.

On appeal to the United States Circuit Court of Appeals for the Fifth Circuit, that Court held, after carefully considering the governing laws and authorities:

> "Guided, as we must be, by the interpretation placed upon the applicable local laws by the State's highest court, we must conclude, as did the court below, that the will is void for failure to state that it was dictated to the Notary and by him written down as dictated in the presence of the witnesses." (R. 246)

Having reached the conclusion that the will was void for failure to state that it was dictated to the

notary and by him written down as dictated in the presence of the witnesses, the Circuit Court of Appeals found it unnecessary to pass upon the question of whether the cause which prevented the testator from signing his name was sufficiently set forth in the will, and so stated. (R. 246)

On application for rehearing, the Circuit Court of Appeals again reviewed the decisions of the Supreme Court of Louisiana on the question of the invalidity of the will and reached the same conclusions, and denied the application for rehearing. (R. 257)

The relationship of the plaintiffs (respondents in this Court) to the decedent, their Brazilian citizenship, the emancipation of the plaintiff Jose Maciel Cadais, the authority of their mother to sue in behalf of the seven unemancipated minors, and the death of their father were proved in the form of fifteen official documents obtained in Brazil. Defendant (petitioner in this Court) has never contended, and as a matter of fact has conceded that the documents prove the matter which they are intended to prove, but he has objected throughout these proceedings to their admissibility in evidence because they were not "authenticated in accordance with Rule 44 of the Federal Rules of Civil Procedure."

These documents were certified in Brazil for use in the State of Louisiana and having been certified

in accordance with a state statute of Louisiana making them admissible in evidence as certified, they were admitted by the District Court. On appeal, the Circuit Court of Appeals held that "in the state courts of general jurisdiction of Louisiana, the rules of evidence on the subject of authentication of foreign documents, such as the ones under consideration, are set forth in two state statutes. Under these statutes, the documents in question were admissible in evidence and under Rules 43(a) and 44(c) the court below properly admitted the documents in evidence." (R. 239-240)

The text of these statutes is printed in the Appendix hereto at page 21.

The contents of these documents is not in dispute here, and neither is the question of the validity or invalidity of the will. The sole and only questions raised in this application for writ of certiorari are those raised under the heading "Questions Presented" in defendant's (petitioner in this Court) petition at page 2.

QUESTIONS PRESENTED

The questions presented on which review is sought in this proceeding are set forth on page 2 of the petition for a writ of certiorari.

While it is impossible to determine the precise questions raised by petitioner because of the phrase-

ology used under the heading "Questions Presented", we believe that the following is what the petitioner intended:

1. Whether Rule 44 (a) of the Federal Rules of Civil Procedure prescribes the sole and exclusive method of authenticating and proving an official record?

2. Whether Rule 44 (a) and (c), when construed in connection with Rule 43 (a), permit the admissibility of an official record in a District Court of the United States when such record is authenticated in accordance with a state statute of the state in which the Federal District Court is held and is admissible in the state court under decisions of the highest courts thereof interpreting the state statutes?

ARGUMENT

Because the answers to both questions are determined by the same rules of interpretation and the same authorities, both questions will be discussed together.

Purpose and Effect of Rules 43 and 44 of the Federal Rules of Civil Procedure.

Subparagraph (c) of Rule 44 specifically provides that said rule does not constitute the exclusive method of proving official records, and affirmatively declares that such records may be proved by "any

method authorized by any applicable statute or by the rules of evidence at common law".

The notes of the Advisory Committee in connection with this rule state plainly enough that this rule was designed to provide a simple and uniform method of proving public records, and that it should not have the effect of precluding the authentication of such documents by any other method recognized and followed before the adoption of the rule.

The effect of Rule 44 is simply that it provides a simple and uniform method of proving public records which, if complied with, is sufficient to permit their admission in evidence. The rule was never intended and it was never construed to abolish other recognized methods of authentication, such, for example, as the authentication in accordance with a state statute of the state in which a federal court is held at the time that such records are offered in evidence.

> "The Federal Rules of Civil Procedure, 28 USCA following Section 723c * * liberalized the reception of evidence rather than restricting it." Mutual Life Insurance Co. v. Green, 37 F. Supp. 949, 951.

The federal courts have consistently interpreted this and other rules of federal procedure so as to liberalize and facilitate the introduction in evidence of all documents and oral testimony when admissible either under Rule 44 or any applicable statute or rule

of evidence obtaining in the courts of the state where the federal courts are held.

The report of the Advisory Committee on Rules, as well as the statements of the commentators, which have been published in book form, indicates that Rule 44 (a) covers and is designed to cover the subject matter of numerous sections of the United States Code dealing with the methods of proving official records. However, this rule is not exclusive, *but merely adds another method of authenticating official documents.*

Rule 43 (a) precludes the possibility of any other interpretation by providing that "All evidence shall be admitted which is admissible under the statutes of the United States or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity or under the rules of evidence applied in courts of general jurisdiction in the state in which the United States court is held.", and that "In any case, the statute or rule which favors the reception of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

The courts have so interpreted these rules since their adoption and have, without exception, permitted the introduction of both documentary and oral evi-

dence when such evidence was admissible under a state statute or rule of evidence.

The rule last quoted is unquestionably applicable to documentary as well as oral evidence. Ulm v. Moore-McCormack Lines, Inc., 117 F. 2d 222; Mutual Life Insurance Co. v. Green, 37 F. Supp. 949; In Re. Robinson, 42 F. Supp. 342, 345; United States v. Aluminum Co. of America, et al., 1 F.R.D. 71.

With these concepts of the two Federal Rules of Civil Procedure relied upon by petitioner in support of his application for a writ of certiorari, we shall consider the paramount question for determination on this application, namely, whether official records should be admitted in evidence in the federal courts when authenticated and proved in accordance with a state statute which declares their admissibility in the state courts of Louisiana?

An Official Record Is Admissible in Evidence in a Federal District Court When Authenticated in Accordance With a State Statute Making It Admissible in Evidence in the Courts of the State Where the Federal Court Is Held.

That official records are admissible in evidence in a federal district court, when authenticated in accordance with a state statute making them admissible in evidence in the courts of the state where the federal court is held, is well established by uniform decisions of the federal courts.

"A question of evidence is to be determined by the rules of the forum. And, Rule 43(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723c, enjoins upon a District Court the use of the rule of evidence, federal or state, which favors admissibility." Franzen v. E. I. DuPont de Nemours & Co., Inc., 146 F.2d 837, 842, Circuit Court of Appeals, Third Circuit, 1944.

"All of the questions presented on this appeal relate to rules of evidence as to which the law of the forum controls. See Pritchard v. Norton, 106 U.S. 124, 133, 134, 1 S.Ct. 102, 27 L.Ed. 104; Restatement, Conflict of Laws (1934 Ed.) #597. In determining such questions, a federal trial court has great latitude under Rule 43(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, which provides, in material part, that the *statute* or rule, *federal or state*, which favors the reception of proffered evidence shall govern its admissibility." Norwood v. Great American Indemnity Co., 146 F.2d 797, 799, Circuit Court of Appeals, Third Circuit, 1944. (Emphasis ours)

"It is not necessary for us to decide whether this testimony was admissible under the rules of evidence heretofore applied in the federal courts, because we think it was admissible under the Texas decisions. Rule 43 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, provides all evidence shall be admitted that is admissible under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States District Court is held, and that, in any case, the statute or rule that favors the reception of the evidence governs." Hartford Accident & Indemnity Co. v. Olivier, 123 F.2d 709, Circuit Court of Appeals, Fifth Circuit, 1941.

"Rule 43 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, which governs the admissibility of evidence, directs the court to receive any evidence which would be admitted under the statutes of the United States, or under the rules of evidence formerly applied in equity suits in the federal courts, or under the rules of evidence applied in courts of general jurisdiction of the state in which the United States Court is held. The use of reported testimony from a prior trial in proceedings between the same parties on the same issue is permissable under Massachusetts rules of admissibility when the witness who originally testified cannot be found after diligent search. Commonwealth v. Gallo, 275 Mass. 320, 175 N.E. 718, 79 A.L.R. 1380."

"Therefore, under the rules of evidence governing the proceedings, I conclude that there was no error in the referee's use of the respondent's testimony given on hearing of the motion to dismiss." In Re Robinson, 42 F.Supp. 342, 345, District Court, D. Massachusetts, 1941.

" * * the rules * * provide directly for the widest admissibility possible under any existing law, state or federal, or relevant evidence. Federal Rules of Civil Procedure, rule 43(a), 28 U.S.C.A. following section 723c; Green, The Admissibility of Evidence under the Federal Rules, 55 Harv. L. Rev. 197; Callahan and Ferguson, Evidence and the New Federal Rules of Civil Procedure: 2, 47 Yale L. J. 194." Commercial Banking Corporation v. Martel, 123 F.2d, 846, 847, Circuit Court of Appeals, Second Circuit, 1941.

" * * the new Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, have attempted to liberalize admissibility of evidence as much as possible by providing always for the widest rule of admissibility, whether federal law

or federal equity or state rule." Dellefield v. Blockdel Realty Co., Inc., 128 F.2d 85, 93, Circuit Court of Appeals, Second Circuit, 1942.

"Federal courts now follow the most liberal rules available in either state or federal practice in the matter of the admissibility of evidence, * *." Milwaukee Mechanics Ins. Co. v. Oliver, 139 F.2d 405, 407, Circuit Court of Appeals, Fifth Circuit, 1943.

In considering the rules of evidence and applying the most liberal, either state or federal, the Circuit Court of Appeals, Third Circuit, in Pollack v. Metropolitan Life Ins. Co., 138 F.2d 123, 127 (1943), declared:

"We think the admissibility of the certificates under the New Jersey statutes, as applied in New Jersey decisions, is not clear, but we do not need to decide the question because there is a federal statute which is applicable and under Rule 43(a) determines the question."

"Admissibility of the evidence is to be determined by the rules heretofore applied in equity cases in United States courts or by the rules of evidence applied in state courts. The statute or rule which favors the reception of the evidence governs. Rule 43 (a), Federal Rules of Civil Procedure. This rule has liberalized the admissibility of evidence as much as possible by providing always for the widest rule of admissibility whether under federal law or federal equity practice or state rule. Dellefield v. Blockdel Realty Co., 2 Cir., 128 F.2d 85." New York Life Ins. Co. v. Seighman, 140 F.2d 930, 932, Circuit Court of Appeals, Sixth Circuit, 1944.

"Under Rule 43(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section

723c, all evidence is admissible in federal court proceedings which heretofore has been admissible either under a state rule of law, a federal rule of law, or a statute, and the rule particularly admonishes that the 'statute or rule which favors the reception of evidence governs'." Franzen v. E. I. DuPont de Nemours & Co., 51 F.Supp. 578, 584, District Court, D. New Jersey, 1943.

"Since under Federal Rule 43(a), 28 U.S.C.A. following section 723c, defendant is entitled to rely upon that statute or rule which favors the reception of the evidence, we are to treat its claims as made on that basis." Ulm v. Moore-McCormack Lines, Inc., 115 F.2d 492, 494, Circuit Court of Appeals, Second Circuit, 1940.

"* * we are directed by Federal Rule 43(a), 28 U.S.C.A. following section 723c, to follow that holding on evidence, whether state or federal, which most favors admissibility." Boerner v. United States, 117 F.2d 387, 391, Circuit Court of Appeals, Second Circuit, 1941.

Citing Rule 43(a) of the Federal Rules of Civil Procedure, the Circuit Court of Appeals, Ninth Circuit, held that in a suit in a Federal District Court in Oregon on a war risk insurance policy, a witness was permitted to refresh his memory from memorandum written by him at the time the facts were known to him, on the basis of a statute of Oregon which authorized the admission of such evidence. United States v. Smith, 117 F.2d 911 (1941).

The Circuit Court of Appeals, Third Circuit, in the case of Hornin v. Montgomery Ward & Co., 120 F.2d 500, 501, 504, held that hearsay evidence, intro-

duced in the trial court without objection, was admissible under Rule 43(a) of the Federal Rules of Civil Procedure and rules of evidence under Pennsylvania law, because such evidence was entitled to the same consideration by a federal court sitting in Pennsylvania as that accorded to it by the state courts.

> "Rule 43(a), 28 U.S.C.A. following section 723c, regarding choice of law with respect to rules of evidence, refers to these three sources: (1) federal statutes; (2) rules formerly applied in federal equity suits and (3) local law. If the evidence is admissible under any of these, it is admissible in the federal trial." In Re Messenger, 32 F.Supp, 490, 496, District Court, E.D. Pennsylvania, 1940.
>
> "The Federal Rules of Civil Procedure are to be construed liberally. Rule 43(a) is designed to favor 'the reception of the evidence'; that is to say, *all of the evidence* which properly may be introduced in respect to the point in controversy." Pierkowskie v. New York Life Ins. Co., 147 F.2d 928, 933, Circuit Court of Appeals, Third Circuit, 1944.
>
> "Under Federal Rules of Civil Procedure, Rule 43(a), 28 U.S.C.A. following section 723c, evidence is to be admitted which is admissible '* * under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held.'" Patterson Ballagh Corporation v. Byron Jackson Co., 145 F.2d 786, 790, Circuit Court of Appeals, Ninth Circuit, 1944.
>
> "The plaintiff contends that, even if the evidence was inadmissible under the rules applicable in the federal court, the evidence was admissible under Minnesota law. The plaintiff is entitled

> to the benefit of the more favorable rule. See Rule 43(a), Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c." Roth v. Swanson, 145 F.2d 262, 269, Circuit Court of Appeals, Eighth Circuit, 1944.

In determining the character of proof admissible in the Federal District Court to prove a foreign law, the District Court of the Southern District of New York, in the case of Empresa Agricola Chicama Ltda. v. Amtorg Trading Corporation, 57 F.Supp. 649, 650, declared:

> "Unquestionably, by virtue of Rule 43(a), F.R.C.P., the more liberal rule for the reception of evidence relating to foreign law, now operative in the New York state courts, has become applicable in the federal courts located in New York."

While petitioner expounds at length on his conclusions and analyses in connection with the admissibility of the documents in question, he cites only one case dealing specifically with the admissibility of documents, which is the only question at issue here. And even that case is not pertinent because the facts involved therein were entirely different from the case under consideration.

The case referred to is United States v. Grabina, 119 F.2d 863, and it is no wise material to our discussion, because no effort was made in that case to introduce the documents under authority of a state statute.

After counsel stated that the Circuit Court of Appeals admitted the documents under authority of applicable Louisiana statutes, and after we have cited and quoted from a host of cases holding that its decision in that respect was correct, it appears almost unnecessary to go through the "idle form of articulating the obvious" by saying that the Grabina case is inapplicable because it did not involve a state statute. Nevertheless, since this was the only case cited by petitioner in support of the specific questions involved herein, we think it advisable to make reference to this very obvious distinction.

Furthermore, a reference to the exhibits themselves will readily disclose that some are original documents, and that these as well as the certified copies of official records are on printed forms, which fact is entitled to some weight (Ulm v. Moore-McCormack Lines, Inc. 117 F.2d 222, 224); that they bear either the seal of the court or the registrar of vital statistics, as the case may be, which seals bear the name of the clerk or the registrar of vital statistics; that the signatures of the attesting officer is certified to by a notary, whose signature is in turn certified to by the American Vice Consul, who certifies, in addition, that the acts of the notary or the attesting officer as such are entitled to full faith and credit; that they are complete in themselves, containing the signatures of the

declarants and all other relevant writings; and that these complete documents are bound together with the certificate of the American Vice Consul, perforated and attached with ribbons, and sealed with the seal of the Vice Consul.

Whereas, in the Grabina case, the court found that the document there involved contained nothing to show that it was complete, as it did not contain the name of the rabbi who officiated, nor did it contain the signatures of the declarants, and the court said:

> " 'There is nothing to show a complete record of this marriage, no rabbi's name.' * * Here the document of record, according to the testimony of the expert on Polish law, consists of a declaration by certain persons, who sign the record, of the fact of marriage. Any 'copy' of that document should include a copy of the signatures of the declarants. * * Documentary evidence is not necessarily conclusive; it may be possible for the person against whom it is offered to contradict or explain it. The appellant had steadfastly denied that he contracted a marriage. If confronted with the names of the declarants he might have been able to strengthen his denial by testimony that he never knew the declarants or that one of them, if he purported to be a rabbi, was not in fact the rabbi of the village when the appellant lived there. In our opinion, the 'extract' was too incomplete to be properly admitted over that objection."

Under these circumstances, it is apparent that for this reason, also, the Grabina case is not analogous to the one under consideration.

In compliance with the interpretation of its rules by this Honorable Court, we shall not brief this case on its merits, as was attempted by petitioner in his brief, which questioned such matters as the effect of the judgment of the District Court in relegating the alternative demands of the petitioner herein to the probate court of the Parish of St. Landry for adjudication in proper proceedings, and the validity or invalidity of a nuncupative will by public act under Louisiana laws, other than to say that the decisions of the District Court and the Circuit Court Appeals, both on the original hearing and the application for rehearing, are correct as to these questions as well as to the two which are pertinent to this application for a writ of certiorari.

Petitioner on page 2 of his petition has specifically listed two questions for determination by this court, under the heading "Questions Presented", and the other issues raised in his brief cannot and do not expand or add to the questions stated. General Talking Pictures Corporation v. Western Electric Co., N. Y. 1938, 58 S.Ct. 849, 304 U.S. 175, 546, 82 L.Ed. 1548; Supreme Court Rules, Rule 38, par. 2, 28 U.S.C.A. following section 354; holding that on certiorari the Supreme Court will limit its consideration of the case to questions specifically brought forward by the petition for the writ and included under the caption "Questions Presented".

It is significant that petitioner does not contend that the documents, if admitted, do not prove conclusively the heirship of the respondents, but, as a matter of fact, he admitted, in response to a question put by the presiding Judge of the Circuit Court of Appeals, that, if admissible in evidence, they proved the identity and heirship of respondents. His only effort has been to prevent the introduction of these documents on the ground that there was no formal or technical certification that the attesting officers were legal custodians of the documents certified to, notwithstanding they were certified for use in the State of Louisiana, which state has statutes enacted in 1898, and in continual force and effect since that time, dispensing with the necessity of this formal technical declaration, and making these documents admissible in either the state or the federal courts in their present form.

The statutes referred to are Act No. 164 of the Legislature of Louisiana of 1898, and Section 1436 of the Revised Statutes of Louisiana (Dart's Statutes Sections 2031 and 2032, respectively), and are quoted in the Appendix to this brief at page 21.

We respectfully submit, therefore, that questions under consideration and raised in this petition for writ of certiorari were properly and correctly determined by the District Court and by the Circuit Court of Appeals for the Fifth Circuit, both on the original

hearing and the application for rehearing, and that the documents in question were properly admitted in evidence.

We further respectfully submit that this petition presents none of the reasons set forth in Rule 38, paragraph 5 (a), (b) and (c) of this Honorable Court, nor does it present any other special or important reason for granting the writ prayed for, and petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE M. WALLACE,
WADE O. MARTIN, JR.,
Counsel for Respondents.

JOHN W. LEWIS,
SETH LEWIS,
Of Counsel.